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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/910,115	08/13/1997	BAYCHAR	BAY-310	2266

24956 7590 08/24/2004

MATTINGLY, STANGER & MALUR, P.C.
1800 DIAGONAL ROAD
SUITE 370
ALEXANDRIA, VA 22314

EXAMINER

JUSKA, CHERYL ANN

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 08/24/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	08/910,115	BAYCHAR,	
	Examiner	Art Unit	
	Cheryl Juska	1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 May 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 7-10, 13, 17, 20-32, 34, 36-38, 40-42 and 44-110 is/are pending in the application.
- 4a) Of the above claim(s) 8-10, 13, 25-32, 34, 36-38, 40-42, 44-88 and 91-109 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7, 17, 20-24, 89, 90 and 110 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

Response to Amendment

2. Applicant's amendment filed May 28, 2004, has been entered. Claims 1, 7, 17, and 20 have been amended as requested. The claims pending for examination are 1-4, 7, 17, 20-24, 89, 90, and 110, with claims 8-10, 13, 25-32, 34, 36-38, 40-42, 44-88, and 91-109 being withdrawn as non-elected.

3. Applicant's amendment is sufficient to overcome the 112, 1st rejection of claims 7, 22, 24, and 90 as set forth in section 5 of the last Office Action. Additionally, applicant's arguments with respect to claims 21-24, 89, 90, and 110 have been found persuasive. In particular, one would not be properly motivated to modify the composite fabric of Broun with microencapsulation technology or a membrane layer so that the foam layer has reversible thermal properties. Hence, the rejection of said claims as set forth in section 15 is hereby withdrawn.

Specification

4. The specification stands objected to for the use of trademarks, as set forth in section 3 of the last Office Action.

Double Patenting

5. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

6. Claims 1, 17, and 20 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 6 of US 6,048,810, as set forth in section 7 of the last Office Action.

Contrary to applicant's assertion that "none of the claims of the '810 patent recite encapsulated outer layers or structurally knitted outer layers as in the present claims" (Amendment, page 28, lines 5-7), claim 6 of the '810 patent limits the outer layer to being treated by encapsulation technology, while claim 7 limits said outer layer is structurally knitted or woven to repel water.

7. Claim 7 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 7 of US 6,048,810. Although the conflicting claims

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are not identical, they are not patentably distinct from each other because it would have been obvious to one skilled in the art to eliminate the second foam layer in order to produce a thinner product, while maintaining moisture transport properties of the composite laminate.

8. Claims 1, 20, 21, 23, 89, and 110 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 8 of US 6,048,810, as set forth in section 8 of the last Office Action.

9. Claims 1 and 20 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 4, 17, and 23 of copending application 08/887,847, as set forth in section 9 of the last Office Action.

10. Claim 21 stands provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 8 and 25 of copending application 08/887,847, as set forth in section 9 of the last Office Action.

11. Claim 23 stands provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 11, 26, and 29 of copending application 08/887,847, as set forth in section 9 of the last Office Action.

12. Claim 110 stands provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 28 of copending application 08/887,847, as set forth in section 9 of the last Office Action.

13. Claims 1 and 20 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 27 of copending application 08/887,847, as set forth in section 10 of the last Office Action.

Claim Rejections - 35 USC § 103

14. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

15. Claim 20 stands rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,431,970 issued to Broun et al., as set forth in sections 12 and 13 of the last Office Action.

16. Claims 1-4, 7, and 17 stand rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,431,970 issued to Broun et al., as set forth in section 14 of the last Office Action.

Response to Arguments

17. Applicant's arguments filed with the amendment have been fully considered but they are not persuasive.

18. Applicant traverses the above rejection by asserting that the examiner's Official Notice is improper since encapsulated Cordura® fabrics were not known prior to the filing of the present application (Amendment, pages 34-35). However, the examiner points to US 5,876,792 issued to Caldwell and assigned to Nextec Applications, Inc., wherein encapsulated fabrics are disclosed having water resistance and breathability (col. 5, lines 8-20). In particular, Caldwell teaches encapsulation of Cordura® fabric (col. 56, lines 4-5). Thus, applicant's argument is found unpersuasive.

19. Applicant also traverses by asserting that the prior art of Broun is not "breathable" since the rate of moisture transfer is slow compared to the present application. This argument is unpersuasive since applicant has not specifically defined in the specification the term "breathable" as having a particular rate of moisture transfer. As such, the broadest reasonable

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interpretation of the term must be employed in examination. According to Webster's Dictionary, the word "breathable" means to allow air to pass through. In the textile arts, the term "breathable" usually includes the passage of water vapor also. However, there is not an accepted moisture transport rate defined by the term "breathable." Since applicant has not set forth a specified rate associated with said term and since the claims do not recited a particular rate, the present claims are not distinguished from the cited prior art via the rate of moisture transfer. Therefore, applicant's argument is unpersuasive.

20. With respect to applicant's argument that one would not be motivated to employ the composite fabric of Broun for an apparel, it is reiterated it would be obvious to one skilled in the art to employ said fabric in apparel applications. Applicant's argument that Broun's teaching of the fabric employed as a bag to carry clothing teaches away from using the fabric as clothing itself is illogical. Clothing is made up of such a variety of fabrics, from silk to aramid fibers. Yes, one would not be motivated to make an evening gown, underwear, or the like out of the composite fabric, but one could be motivated to make protective outer wear, active wear, or the like from the Broun composite fabric. Therefore, applicant's argument is unfounded and the above rejection is maintained.

Allowable Subject Matter

21. Claims 21-24, 89, 90, and 110 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

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Conclusion

22. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

23. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


CHERYL A. JUSKA
PRIMARY EXAMINER